(1)

Supreme Court, U.S.
FILED

97 722 SEP 16 1997

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

In Re William Bennett

Petitioner

Petition for Writ of Mandamus to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF MANDAMUS

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30 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does Federal Rule of Appellate Procedure Rule 38 require the Court of Appeals to provide notice to a party enabling it to reasonably respond to a sua sponte consideration of sanctions occurring for the first time long after oral argument?

2. Did the Court of Appeals violate the notice requirement of Federal Rules of Appellate Procedure Rule 38 by inexplicably affirming a grant of a directed verdict that occurred in a civil rights trial on 23 October 1995 based upon non-existent decisions supposedly dated 24 October 1995 and 25 October 1995 and then sanctioning appellate counsel without any notice as to how he is suppose to know about these decisions?

LIST OF ALL THE PARTIES/PERSONS AGAINST WHOM RELIEF IS SOUGHT AND REASON RELIEF SOUGHT IS NOT AVAILABLE IN ANY OTHER COURT

The Petitioner William Bennett is the Plaintiff-Appellant in William Bennett v. Peter O'Malley, United States Court of Appeals for the First Circuit No. 95-2347.

A writ of mandamus is sought ordering the following Judges of the First Circuit Court of Appeals to comply with Federal Rule of Appellate Procedure Rule 38 requiring that notice be given and a "reasonable opportunity to respond" occur before awarding sanctions:

Honorable Juan R. Torruella

Honorable Conrad K. Cyr

Honorable Norman H. Stahl

Relief is not available in any other

Court because this Court is the only Court superior to the First Circuit Court of Appeals. A petition for a writ of certiorari is not an alternate remedy because without a Notice from the Appeals Court as to why Appellant's case is meritless, Petitioner and his counsel cannot make any rational decision as to what if any basis there is for a petition for a writ of certiorari.

In the alternative, Petitioner submits that Supreme Court Rule 10A applies because a United States Court of Appeals has entered a decision that is far departed from the accepted and usual course of judicial proceedings and that a writ of certiorari issue for review of the underlying opinion. In the alternative, Petitioner is asking for certiorari review of the underlying

Decision, in which case an additional party would be Peter O'Malley, the Defendant-Appellee in William Bennett v. Peter O'Malley, United States Court of Appeals for the First Circuit No. 95-2347.

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OPINION BELOW

The unpublished decision of the First Circuit Court of Appeals affirming the underlying District Court decision is attached at Appendix page 2. The award of sanctions is attached at Appendix page 6.

JURISDICTION

Issuance by this Court of the writ of mandamus is authorized by 28 U.S.C. §1651(a). The alternate remedy of certiorari is allowed by Rule 10 of the Supreme Court Rules because a United States Court of Appeals has entered a decision that is far departed from the accepted and usual course of judicial proceedings in its Decision dated 18 June

1997.

STATUTORY PROVISIONS INVOLVED

The Federal Rules of Appellate Procedure Rule 38 states:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

PROCEEDINGS BELOW

This Civil Rights Action was initially brought by the Plaintiff in the Superior Court of Suffolk County, Massachusetts, in which jurisdiction was

proper pursuant to Mass. General Law, Chapter 212, s. 4 and Chapter 12, s.11(i). On December 7, 1992, the Defendants removed this case to the United States District Court for the District of Massachusetts pursuant to 28 U.S. Code 1441 and the underlying jurisdictional statute of 28 U.S. Code 1331. The Court of Appeals had appellate jurisdiction of this Action pursuant to 28 U.S. Code s. 1291 because it is an appeal from a final decision of a District Court of the United States.

The trial in the Plaintiff's claims against the Defendant commenced on October 16, 1995. On October 23, 1995, Judge William G. Young allowed Defendant's Motion for a Directed Verdict on the subject causes of action of this appeal. The Court allowed Plaintiff's

other claims to continue to a jury verdict.

The Record shows that there were no motions nor decisions made nor argued on 24 October 1995 and that the motion made at the close of the evidence by the Defendants on 25 October 1995 was denied by the District Court and not appealed. Judgment was entered for the Defendant Peter O'Malley on October 31, 1995. Motion for Relief from Judgment by the Plaintiff was filed on November 3, 1995. The Motion for JNOV was denied on November 17, 1995. Notice of Appeal by Plaintiff William Bennett was filed on November 30, 1995.

The underlying Appeal of this Petition is William Bennett v. Peter O'Malley, First Circuit Court of Appeals, No. 95-2347.

This appeal was from a directed verdict granted on 23 October 1995 in Petitioner's civil rights trial. The appeal was docketed in the First Circuit Court of Appeals on 18 December 1995. The Appellant's Brief was filed on 22 January 1997.

The Appellee's Brief was filed on 10 March 1997. There was never any motion for sanctions by the Appellee in his Brief nor by separately filed motion.

Oral argument was held on 7 May 1997. The Court of Appeals, Judges Torruella, Cyr, and Stahl, on that day made no mention of a possible consideration of sanctions and in fact asked **no questions** about the brief or issues on appeal.

The Court's decision was entered on June 18, 1997. The Decision entered on

June 18, 1997 contained an Order to Show Cause as to "why double costs and attorney's fees on appeal should not be assessed against" appellant's counsel citing Federal Rules of Appellate Procedure Rule 38; 28 U.S.C. §1927. The Decision affirmed the directed verdict of 23 October 1995 on the basis of the District Court's rulings "on October 24 and 25, 1995 on Defendant's Motion for Judgment as a Matter of Law."

There were no such rulings.

At no point prior to the issuance of the decision on June 18, 1997 was there any indication that the Court of Appeals was considering sanctions for a frivolous appeal. On 26 June 1997, appellant's counsel filed a Response to the Order to Show Cause stating that he could not reasonably respond to the Order without

some explanation as to why the appeal was meritless or how the judgment could be affirmed based upon non-existent decisions. Appendix, p. 3.

STATEMENT OF FACTS

This Action arises out of alleged unlawful searches of Plaintiff's homes in November, 1989, as part of the Boston Police Department's investigation of the murder of Carol DiMaiti Stuart. It alleges that the Defendant/Appellee and others conspired to use unlawful means to obtain statements implicating William Bennett as a suspect in the Stuart murder. These statements, obtained by threats, intimidation and coercion, were then knowingly used as the basis for

seeking search warrants for Plaintiff's homes.

On October 23, 1989, Carol DiMaiti Stuart, then seven months pregnant, and her husband Charles Stuart were shot in the Mission Hill neighborhood of Boston. Carol Stuart died several hours later on October 24, 1989. Charles Stuart successfully fooled the Boston Police into believing that a black male committed the murder. Though no such black male existed, the Defendant went on to build a case implicating the Plaintiff William Bennett as the murderer. Matthew Stuart, Charles Stuart's brother, eventually voluntarily went to the police and informed them that his brother Charles Stuart committed the murder. Charles Stuart committed suicide before he could be caught by the Police.

REASONS FOR GRANTING THE PETITION, OR IN THE ALTERNATIVE FOR GRANTING CERTIORARI REVIEW

Federal Rules of Appellate Procedure Rule 38 was amended in 1994 to require that "a separate motion be filed by the appellee or that notice be received from the Court in order to impose Rule 38 sanctions." Simmons v. All State Life Insurance Company, 65 F.3d. 526 (6th Cir. 1995); Federal Rules of Appellate Procedure Rule 38, advisory committee notes.

The purpose of the amendment was to reflect the Supreme Court's due process principles annunciated in Roadway Express Incorporated v. Piper, 447 U.S. 752, 767 (1980). Id. The notice and opportunity to respond must occur before the imposition of sanctions. Id.

"[A]ttorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." Roadway Express, Inc. v. Piper, 447 U.S. 752, 766, 100 S.Ct. 2455, 2464 (1980).

Mandamus is properly used to compel an inferior court's compliance with due process requirements. S.B.C. Investments Limited v. The Honorable Sidney B. Brooks, 101 Br. 257, 260 (D.Co. 1989). Mandamus can be used to compel compliance with due process requirements. Elliott v. Weinberger, 564 F.2d. 1219 (9th Cir. 1977); Hartland v. Alaska Airlines, 544 F. 2d. 992 (9th Cir. 1976); Holmes v. United States Board of Parole, 541 F.2d. 1243 (7th Cir. 1976). Mandamus is proper not only in egregious jurisdictional violations but in instances of "more

mundane usurpations of power." Skill Corporation v. Millers Falls Company, 541 F.2d. 554, 557, n. 3 (6th Cir. 1976); cert. den. 429 U.S. 1029, 97 S.Ct. 653 (1976); In Re: Allied-Signan, Inc., 915 F.2d. 193 (6th Cir. 1990).

This Court has stated that mandamus is to be "used to confine an inferior Court to the lawful exercise of its proscribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Kerr v. United States District Court, 426 U.S. 394, 402, 96 S. Ct. 2119, 2123 (1976). The invocation of the writ of mandamus is used to confine an inferior court to a lawful exercise of its power or to compel it to exercise its duty; such a writ is used in situations in which a lower court has acted or so abused its discretion that there is sort

of an usurpation of power. Roche v. Evaporated Milk Association, 319 U.S. 21, 26, 63 S. Ct. 938, 941 (1943).

Petitioner respectfully submits that the Order to Show Cause issued as part of the one paragraph decision in this Action does not satisfy the requirements of F.R.App.P. Rule 38, the due process concerns that caused the 1994 amendment of Rule 38, nor does it provide the due process that the amendment was intended to achieve. Not only does the Order not specify why the appeal is frivolous but it is also bewildering because the Court's affirmance of the Decision under appeal granted on 23 October 1995 is apparently based either upon evidentiary rulings made after the directed verdict on 24 and 25 October 1995 or upon a non-existent substantive decision.

This appeal is from a Directed Verdict decision for the Defendant/ Appellee O'Malley granted on 23 October 1995 during the course of a trial that went to final Judgment on 31 October 1995. The Court affirmed the District Court's decision "on the basis of its rulings on October 24 and 25, 1995, on Defendant's Motion for Judgment as a Matter of Law." Appendix at p. 2. The Record shows that there was no such Motion made nor argued on 24 October 1995 and that the motion made at the close of the evidence by the Defendants on 25 October 1995 was denied by the District Court and not appealed.

Petitioner respectfully submits that the Order to Show Cause gives the impression that this appeal is not frivolous but that the Court simply has

not bothered to consider its merits. As scholars have noted, the imposition of sanctions are disproportionately applied against plaintiffs in civil rights cases indicating that is it being used as an unfair tool for the benefit of defendants that "allows them to unfairly attack this kind of **disfavored litigation.**" Rule 11 Sanctions: Case Law Perspectives and Preventive Measures, Georgene M. Vairo, §2.02(b) at page 2-18.1, (emphasis added) and § 4.01(b) pages 4-4 and 4-20.1.

Without meaningful notice from the Court as to why Appellant's case is frivolous, Petitioner and his counsel do not have a "reasonable opportunity to respond" as required by F.R.App.P. Rule 38 and cannot make any rational decision as to what if any basis there is for a petition for a writ of certiorari.

Petitioner and his counsel still believe that this appeal is meritorious.

CONCLUSION

The Supreme Court of the United States should grant a writ of mandamus vacating the award of sanctions, ordering the First Circuit Court of Appeals to provide meaningful notice as to why sanctions were ordered in the underlying case, or, in the alternative, grant certiorari review of the subject decision and order for sanctions.

Petitioner by his attorney,

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Date:

APPENDIX

{NOT FOR PUBLICATION}

United States Court of Appeals

For the First Circuit

No. 95-2347

WILLIAM BENNETT,

Plaintiff - Appellant,

v.

PETER O'MALLEY,

Defendant - Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. William G. Young, U.S. District Judge]

Before

Torruella, Chief Judge,

Cyr, Senior Circuit Judge,

and Stahl, Circuit Judge.

Valeriano Diviacchi, with whom Diviacchi Law Office was on brief for appellant.

Ronald Kovner, with whom Christopher J. Muse and Merita Hopkins were on brief for appellee.

June 18, 1997

Per Curiam. Upon full consideration of the record, briefs and argument of counsel, we affirm the decision of the district court on the basis of its rulings on October 24 and 25, 1995, on Defendant's Motion for Judgment as a Matter of Law.

We believe that appellant's contentions on appeal are completely without merit. Because we find this to be a frivolous appeal, we order appellant's counsel to show cause within ten days of the issuance of this opinion why double costs and attorney's fees on appeal should not be assessed against him. See Fed. R. App. P. 38; 28 U.S.C. § 1927.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

WILLIAM BENNETT NO. 95-2347
Plaintiff/Appellant

v.

PETER O'MALLEY
Defendant/Appellee

RESPONSE TO ORDER TO SHOW CAUSE

Appellant's Counsel responds to the Order to Show Cause as follows:

1. Counsel respectfully submits that the Order to Show Cause is not sufficient notice to allow Counsel to submit a Response. Not only does the Order not specify why the appeal is frivolous but it is also bewildering because this Court's affirmance of the Decision under appeal granted on 23 October 1995 is based apparently upon evidently rulings made on 24 and 25 October 1995. This appeal is from a Directed Verdict decision for the Defendant/Appellee O'Malley granted on 23 October 1995 during the course of a trial that went to final Judgement on October 1995. This court affirmed the District Court' decision "on the basis of its rulings on October 24 and 25, 1995, on Defendant's Motion for Judgment as a Matter of Law." Order.

Appellant respectfully submits that the Record shows that there was no such Motion made nor argued on 24 October and that the motion made at the close of the evidence by the Defendants on 25 October was denied by the District Court and not appealed.

2. "[A]ttorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." Roadway Express, Inc. v. Piper, 447 U.S. 752, 766, 100 S. Ct. 2455, 2464 (1980). Counsel respectfully submits that Appellant's Counsel could not possibly foresee or respond to a Notice that this Court's affirmance of a directed verdict would be based upon some unspecified evidentiary rulings made on the two trial days after the subject Directed Verdict of this appeal was already allowed. Counsel respectfully submits that the Order to Show Cause gives the impression that this appeal is not frivolous but that the Court simply has not considered its merits.

3. The Plaintiff/Appellant's case in this Action established that Defendant O'Malley through the use of physical threats, verbal abuse, physical restraint, perjury, the forced feeding to witnesses of information known only to the murderer and the police, and omission

of such unlawful acts from search warrant affidavits successfully obtained search warrants to search not his personal property. Appellant argues that such establishes a legal violation of his civil rights and actual damages in addition to nominal damages which is enough for a cause of action.

4. Appellant's Counsel still believes that Defendant/Appellee's Response that the information known only to the murderer and the police was actually public knowledge is unsupported by anything in the Record and was erroneously adopted the District Court. Defendant/Appellee without supporting testimony went on to further argue that regardless of the omission of the physical threats, verbal abuse, physical restraint, perjury, the forced feeding to witnesses of information known only to the murderer and the police from the search warrant affidavits that, of course, the Defendant Affiant did not lie and could be trusted to have told the truth in the remaining portions of the search warrant; therefore, the search warrants would have been issued anyway.

5. Without a Notice from this Court as to why Appellant's argument summarized in paragraph #3 supra is frivolous, counsel

cannot explain why it is not and still believes that this appeal is meritorious and if anything it is Defendant's response summarized in paragraph 4 supra that makes no sense.

Appellant by his attorney,

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Date:

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-2347

WILLIAM BENNETT,
Plaintiff, Appellant,

v.

FRANCIS M. ROACH, ET AL.,
Defendants, Appellees.

Torruella, Chief Judge
Judge Cyr and Judge Stahl

ORDER OF THE COURT

Entered: July 25, 1997

It is ordered that double costs and attorney's fees should be assessed against appellant's counsel in favor of the appellee.

By The Court
WILLIAM H. NG, Clerk
By JANICE M. O'NEIL
Chief Deputy Clerk

[Cert copy to Clerk, USDC of Massachusetts]
[cc: Messrs, Muse and Diviacchi]